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PROPERTY

A. N. Yiannopoulos*

COMMON, PUBLIC, AND PRIVATE THINGS

According to well-settled Louisiana legislation, jurisprudence, and doctrine, the beds or bottoms of navigable waterbodies are insusceptible of private ownership and necessarily belong to the state.¹ When lands are formed along the shores of navigable waterbodies as a result of alluvion,² or when lands are exposed as a result of dereliction,³ question arises as to the ownership of these lands. In this respect, Louisiana law draws a distinction between navigable rivers, navigable lakes, and the sea. Alluvion and dereliction along the shores of navigable rivers belong to the riparian owners⁴ whereas alluvion and dereliction along the shores of navigable lakes and of the sea belong to the state.⁵ Quite frequently, therefore, it is important to determine whether a particular body of water is a river or an inland lake. This question was raised in *State v. Placid Oil Co.*⁶ The significance and implications of this most important decision were discussed previously in this *Review*.⁷ This writer's personal involvement with the case precludes further comments.

The question whether the repose statute of 1912 cures all patents, including those that were absolute nullities at the time they were issued, was raised in two decisions. In *Sinclair Oil & Gas Co. v. Delacroix Corp.*⁸ the Fourth Circuit Court of Appeal found that the bodies of water in question were non-navigable at the time of their transfer to private interests; hence, the patents conveying them were valid or cured by the repose statute. The opinion deserves attention because it contains an enlightened discussion of tests of navigability

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1. LA. CIV. CODE arts. 453, 482; A. YIANNPOULOUS, PROPERTY § 32 in 2 LOUISIANA CIVIL LAW TREATISE 90 (1967) [hereinafter cited as CIVIL LAW PROPERTY].

2. Alluvion is defined as "the accretions, which are formed successively and imperceptibly to any soil situated on the shore of a river or other stream." LA. CIV. CODE art. 509.

3. Dereliction is defined as the process whereby lands are "formed by running water retiring imperceptibly from one of its shores . . ." *Id.* art. 510.

4. *Id.* arts. 509, 510.

5. As to sea, see *id.* art. 510; *Bruning v. New Orleans*, 165 La. 511, 115 So. 733 (1928). As to lakes, see *State v. Aucoin*, 206 La. 787, 20 So. 2d 136 (1944). *But cf.* *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973) (accretions and derelictions along navigable waterbodies subject to the equal footing doctrine and the Submerged Lands Act; a federal question governed by federal law).

6. 300 So. 2d 154 (La. 1974).

7. See Note, 35 LA. L. REV. 199 (1974).

8. 285 So. 2d 845 (La. App. 4th Cir. 1973).

and an interpretation of the "oyster" statutes⁹ in the light of their purpose. In *Gulf Oil Corp. v. State Mineral Board*,¹⁰ the same court held that patents conveying navigable water bottoms contrary to oyster statutes in force at the time of their issuance were absolute nullities and that, as such, they could not be cured by the repose statute of 1912. The Louisiana supreme court granted certiorari,¹¹ and the question before the court seems to be the viability of *California Co. v. Price*¹² or at least its restriction to pre-1887 patents.¹³

MOVABLES AND IMMOVABLES

It is settled law that standing crops are susceptible of separate ownership, namely, that they may belong to a person other than the owner of the ground as movables by anticipation.¹⁴ It is equally well settled that a predial lessee owns the crops that he grows and that, if his lease is recorded, he may assert his ownership against third persons.¹⁵ A tortfeasor causing damage to the standing crops of a lessee is not a person entitled to rely on the public records; hence, there should be no doubt that an unrecorded predial lessee may assert his ownership against the wrongdoer and claim damages for the destruction of his crops. In *Hargroder v. Columbia Gulf Transmission Co.*,¹⁶ Chief Justice Sanders declared that the predial lessee's recovery was based on a theory of stipulation pour autrui. Four Justices concurred in the result, two writing separate opinions and basing recovery on article 2315 of the Civil Code.¹⁷

LEGAL SERVITUDES

Articles 667-669: Actions for Damages

According to well-settled Louisiana jurisprudence, the violation

9. For an analysis of the "oyster" statutes, see CIVIL LAW PROPERTY § 32.

10. 291 So. 2d 807 (La. App. 4th Cir. 1974).

11. 294 So. 2d 831 (La. 1974).

12. 225 La. 706, 74 So. 2d 1 (1954).

13. See *The Work of the Louisiana Appellate Courts for the 1969-1970 Term — Property*, 31 LA. L. REV. 196, 198-99 (1971).

14. See Yiannopoulos, *Standing Crops, Movables or Immovables?*, 17 LOYOLA L. REV. 323, 325 (1971).

15. See *Flower & King v. S.S. Pearce & Son*, 45 La. Ann. 853, 13 So. 150 (1893); *Lewis v. Klotz*, 39 La. Ann. 259, 1 So. 539 (1887); *Porche v. Bodin*, 28 La. Ann. 761 (1876).

16. 290 So. 2d 874 (La. 1974).

17. *Id.* at 877 (Barham, J., concurring); *Id.* at 878 (Tate, J., concurring). For this writer's views, see *The Work of the Louisiana Appellate Courts for the 1972-1973 Term — Property*, 34 LA. L. REV. 207, 209-13 (1973).

of the obligations of vicinage, imposed by articles 667 and 669 of the Civil Code, gives rise to civil responsibility without negligence.¹⁸ Questions concerning the foundation, nature, and extent of this responsibility were raised in *Lombard v. Sewerage & Water Board of New Orleans*,¹⁹ in which the Louisiana supreme court awarded damages to landowners for injuries to their properties resulting from construction works on a city street. Justice Summer's scholarly opinion has been discussed elsewhere.²⁰ For present purposes it suffices to state that the *Lombard* decision deserves attention because it imposes on a contractor responsibility without negligence under article 667 solidarily with a public body as owner of the city street.²¹

According to Louisiana decisions, diminution of land values, though unquestionably caused by acts, constructions, or activities on neighboring property, does not support an award for damages under article 669 in the absence of allegations and proof of physical invasion of property by excessive emissions.²² In *Hero Lands Co. v. Texaco, Inc.*,²³ plaintiff claimed damages for the depreciation of his property resulting from the construction of a gas pipeline on neighboring property. Plaintiff alleged neither negligence in the construction or operation of the pipeline nor physical discomfort or damage caused by excessive emissions, facts that would have supported liability under article 669 corresponding with liability for "nuisance" in common law jurisdictions. The court did not dispute the fact that the value of plaintiff's property had depreciated, but sustained defendant's exception of no cause of action in accordance with the implications of a long series of Louisiana decisions. In *Peevy v. Town of Jonesboro*,²⁴ the court avoided the issue whether damages for depreciation of property are recoverable under article 669 of the Civil Code by a finding that the discomfort suffered by neighboring landowners was of a temporary nature.

Articles 667-669: Action of Injunctive Relief

Article 667 of the Civil Code as well as article 669 sustains actions

18. See Yiannopoulos, *Violations of the Obligations of Vicinage: Remedies under Articles 667 and 669*, 34 LA. L. REV. 475, 479 (1974) [hereinafter cited as *Violations of Vicinage*].

19. 284 So. 2d 905 (La. 1973).

20. See Yiannopoulos, *Civil Responsibility in the Framework of Vicinage: Articles 667-669 and 2315 of the Civil Code*, 48 TUL. L. REV. 195, 233 (1974).

21. *Id.* at 234.

22. For detailed discussion, see *Violations of Vicinage* at 513.

23. 296 So. 2d 345 (La. App. 4th Cir. 1974) *cert. granted*, 301 So. 2d 44 (1974).

24. 286 So. 2d 378 (La. App. 2d Cir. 1973).

for injunctive relief.²⁵ Injunctive relief under article 667 is available to a landowner when a neighboring landowner abuses his ownership by undertaking acts, works, or activities that cause damage or are expected with a degree of certainty to cause damage. Injunctive relief under article 669, however, is available to any person of normal sensibilities who suffers excessive physical discomfort on account of acts, works, or activities on neighboring property that constitute an exceptional use of property or a use that is unreasonable under the circumstances.

In *Salter v. B.W.S. Corp.*,²⁶ an action was brought by a neighboring landowner and a predial lessee to enjoin defendants from disposing of chemical waste on their own property. The trial court issued an injunction prohibiting the defendants from "disposing of any acid and/or chemicals on their property," and the Third Circuit Court of Appeal affirmed.²⁷ The Louisiana supreme court found that the adjoining landowner had no ground to complain because he had failed to prove that operations on defendant's property would damage his property. Turning then to lessee's claim for injunctive relief, the court remanded the case to the district court with instructions to issue a "qualified injunction," namely, one enjoining the defendant "to conduct its operations in compliance with standards recommended by its experts which will prohibit the escape of noxious substances on the property of its neighbors."²⁸

There is nothing extraordinary in this narrow holding: the statement of facts substantiates the conclusion that the interests of the lessee were threatened with irreparable harm. Accordingly, injunctive relief was entirely appropriate under article 3601 of the Code of Civil Procedure, which is applicable to anyone. In a majority opinion, however, Justice Dixon sought to support the decree of the court on the basis of article 667 of the Civil Code and to suggest a number of ideas that deserve comment. Justice Barham, with whom Justice Tate joined, filed a scholarly and eloquent concurring opinion.

According to the majority opinion, a predial lessee has a right to seek injunctive relief under article 667. This might be a plausible idea, but the only authorities cited for the proposition are two cases involving claims under article 669, namely, injunctive relief on account of insufferable inconveniences caused by emissions, and one case involving an action for damages.²⁹ Further, the majority opinion

25. For detailed discussion, see *Violations of Vicinage* at 482, 515.

26. 290 So. 2d 821 (La. 1974).

27. 281 So. 764 (La. App. 3d Cir. 1973).

28. 290 So. 2d 821, 825 (La. 1974).

29. See *Robichaux v. Huppenbauer*, 258 La. 139, 245 So. 2d 385 (1971) (stable);

declares that "the availability of injunctive relief in an action predicated on C.C. 667 is controlled by C.C.P. 3601. C.C. 667 does not specifically provide for injunctive relief; thus, an injunction is only available under this article upon showing of irreparable injury."³⁰ Characteristically, no authorities are cited for this statement which, in effect, limits the applicability of article 667 to actions for damages only. Indeed, why should one complicate his case by invoking article 667 if one can prove the threat of irreparable harm under article 3601 of the Code of Civil Procedure? But the Civil Law has historically granted injunctive relief to a landowner in case of actual or threatened unlawful interference with his ownership;³¹ and it would be anachronistic to assert that this relief is subject to the limitations of equity jurisprudence, including the notion of "irreparable harm" that article 3601 of the Code of Civil Procedure has adopted. Injunctive relief under article 667 of the Civil Code is a matter of right and quite independent of any other article of the Civil Code or of the Code of Civil Procedure. The duties that article 667 imposes are likened to servitudes, and, as servitudes, are enforceable by injunction upon a showing of actual or impending damage or deprivation of enjoyment, resulting from an abusive exercise of the right of ownership by a neighbor.³² Recent decisions correctly point out that injunctive relief in this field of property law is available without the historical limitations of equity jurisprudence³³ and that in an action for injunction under article 667 it is not necessary to plead and prove irreparable injury.³⁴

Enclosed Estates

In *Patin v. Richard*,³⁵ by a common act of sale, a landowner subdivided his property in 1949 into three distinct lots, referred to as A, B, and C and sold each to a different purchaser. The present

Violett v. King, 46 La. Ann. 78, 14 So. 423 (1894) (stable); Lombard v. Sewerage & Water Board, 284 So. 2d 905 (La. 1973) (damages).

30. 290 So. 2d 821, 825 (La. 1974).

31. See CIVIL LAW PROPERTY §§ 121, 128, 150, 152.

32. For detailed discussion, see *Violations of Vicinage* at 485.

33. Poole v. Guste, 261 La. 110, 262 So. 2d 339 (1972).

34. Borenstein v. Joseph Fein Caterers, Inc., 255 So. 2d 800, 805 (La. App. 4th Cir. 1972); see also *New Orleans v. Degelos Bros. Grain Corp.*, 175 So. 2d 351 (La. App. 4th Cir. 1965) (injunction under Article 669). For exceptional decisions confusing the requirements for injunctive relief under the old Code of Practice and under articles 667-669 of the Civil Code, see *Busby v. International Paper Co.*, 95 F. Supp. 596 (W.D. La. 1951); *Young v. International Paper Co.*, 179 La. 803, 155 So. 231 (1934); *Gibson v. Baton Rouge*, 161 La. 637, 109 So. 339 (1926).

35. 291 So. 2d 879 (La. App. 3rd Cir. 1974).

owners of the three lots are particular successors of the original acquirers, namely, their vendees or transferees.³⁶ As a result of the subdivision and sale, lots *B* and *C* became enclosed; lot *A* was the only one communicating with the public road. Since the time of the sale, the owners of lots *B* and *C* have been using an unpaved driveway on lot *A* for exit into the public road. Recently, the owner of lot *B* forbade the owner of lot *C* to use the driveway on lot *B* for exit into the public road through lot *A*. The owner of lot *C* then brought suit against the owner of lot *B*, claiming a right of passage.

The trial court dismissed the suit on the ground that it had no authority to decree a legal servitude on *A*'s property since he had not been made a party to the proceedings. The court thought that it could have decreed a passage through *B*'s property, if *B*'s property communicated with a public road; but *B*'s property was also enclosed. The Third Circuit Court of Appeal reversed and rendered judgment for plaintiff based on article 701 of the Civil Code, with Judge Domengeaux dissenting.³⁷

Article 701 of the Civil Code declares:

[I]f the estate, for which the right of passage is claimed, has become inclosed by means of sale, exchange or partition, the vendor, coparcener or other owner of the land reserved, and upon which the right of passage was before exercised, is bound to furnish the purchaser or owner of the land inclosed with a passage gratuitously, and even when it has not been sold or transferred with the rights of servitude.

There is no corresponding provision in the 1804 Napoleonic Code.³⁸ The direct source of article 701 is the text of Maleville³⁹ and it ex-

36. See LA. CIV. CODE art. 3556(28).

37. 291 So. 2d 879, 885 (La. App. 3d Cir. 1974).

38. See 1972 COMPILED EDITION OF THE CIVIL CODES OF LOUISIANA art. 701 (J. Dainow ed.). Article 684 of the Napoleonic Code, however, was amended by the Law of August 20, 1881 to read: "If an estate is enclosed as a result of the division of a tract of land by virtue of a sale, exchange, partition or any other contract, passage can only be claimed over the lands forming the object of these acts. Nevertheless, when a sufficient passage cannot be made over the lands thus divided, Article 682 shall apply." For applications of this provision, see 3 PLANIOL ET RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 940 (2d ed. Picard 1952).

39. See 1 LOUISIANA LEGAL ARCHIVES, *PROJET OF THE CIVIL CODE OF 1825*, at 74 (1937): "Digest, book 12, tit. 6, law 22, sec. 1 *Analyse Raisonnée de Maleville*, vol. 2, p. 130." Cf. 2 MALEVILLE, *ANALYSE RAISONNÉE DE LA DISCUSSION DU CODE CIVIL AU CONSEIL D'ÉTAT* 130 (1805): "Pour lors c'est au propriétaires des fonds réservés, et sur lesquels s'exerçait auparavant le passage, à le fournir à l'acquéreur ou donataire, et gratuitement, quand même le fonds n'aurait pas été vendu ou donné avec ses droits de servitude"

presses well-settled French doctrine and jurisprudence. Thus, according to Laurent:

When a tract of land is divided by an act of sale and a part of it becomes enclosed, the part that has access to a public road is burdened with a servitude of passage in favor of the enclosed part. This is a logical consequence of the obligations of the seller We must thus decide that there is a tacit agreement by virtue of which the passage is due by one of the parties to the other. This will always be a *conventional* rather, than legal passage.⁴⁰

This excerpt supports the view expressed in the majority opinion. If lots *A*, *B*, and *C* were still in the hands of the original purchasers, there should be no doubt that plaintiff, owner of lot *C*, was entitled to a gratuitous right of passage over lots *B* and *A*. But question arises whether this obligation to grant a gratuitous passage has been transmitted to the subsequent purchasers of lots *B* and *A*. In this respect, Laurent has this to say:

May the second purchaser claim the passage to which his ancestor in title was entitled? No, it has been said, because he has purchased an enclosed estate. He does not have a right of action by virtue of the sale, but he has a right of action for a legal servitude of passage. The Court of Cassation has ruled in this sense. [Cass. April 24, 1867, D. 1867.1.227]. It seems to us that the purchaser had an action against the author of his vendor. On what is founded this action of the purchaser tending to obtain passage? On the obligation of warranty contracted by the vendor. Thus, in case of successive sales, the last purchaser may exercise the action in warranty that belonged to his vendor. This is established in the title of Sales. If one admits the principle, the question is determined. The passage is a necessary accessory of the tract of land; if the vendor has demanded and obtained it, it is certain that, without any stipulation, it would have been transmitted to the purchaser; thus, he has an action to claim the passage, and one who has an action is considered to have the thing itself. If the vendor transmits the passage to the purchaser, he also transmits to him the action that tends to obtain the passage.⁴¹

It would seem, therefore, that the opinion of the majority is supported

40. 8 LAURENT, PRINCIPES DE DROIT CIVIL FRANÇAIS 110-11 (1876) (emphasis added).

41. *Id.* at 113.

by application of the law of sales. Questions of liberative prescription did not arise because the owner of lot C brought action as soon as the right of passage was refused to him by the owner of lot B.

There remains the question whether the owner of lot A was an indispensable party in the proceedings. If the demand were for a *legal servitude* of passage under articles 699-700, the case should be remanded to the trial court, because without the owner of lot A as a party in the proceedings, all the court "could grant is a passage to the nearest *neighbor* which is not provided for in the aforementioned articles."⁴² But if the demand was actually for a recognition of a *conventional right* of passage under article 701, the court could, and should, grant the relief requested. The majority of the court, in spite of contradictory statements by plaintiff, thought that the essence of the demand was for the recognition of a conventional right of passage that had existed since 1949.

CONVENTIONAL SERVITUDES

Contracting parties dealing with immovable property do not always carefully designate the kind of right they intend to establish. Instead of using the proper name, they use descriptive terms. Thus, quite frequently, the title creating a right of way servitude is silent as to whether the servitude is personal or predial. The resolution of this question is a matter of contractual interpretation and is governed by both the general rules of construction of juridical acts⁴³ and the rules of construction applicable specifically to documents purporting to create servitudes.⁴⁴ In *State, Department of Highways v. Cefalu*,⁴⁵ the quantum of an expropriation indemnity depended on whether a right of way servitude was personal or predial. Justice Calogero, relying on the language used by the parties as expressive of their intent, on the purpose of the grant, and on the rule of interpretation established in article 756 of the Civil Code, concluded that a predial servitude had been created.

St. Julien Doctrine

In *Harrison v. Louisiana Power & Light Co.*,⁴⁶ an action for trespass, plaintiff was successful in obtaining damages though not an

42. *Patin v. Richard*, 291 So. 2d 879, 886 (La. 1974) (Domengeaux, J., dissenting).

43. See LA. CIV. CODE arts. 1945-62.

44. *Id.* arts. 753-58. For detailed discussion, see Yiannopoulos, *Predial Servitudes; Creation by Title: Louisiana and Comparative Law*, 45 TUL. L. REV. 459, 493 (1971).

45. 288 So. 2d 332 (La. 1974).

46. 288 So. 2d 37 (La. 1974).

injunction for the removal of electrical poles encroaching on his property. The lower court based its refusal to grant injunctive relief on the *St. Julien* doctrine, an extra-statutory mode of servitudes of acquisition sanctioned by the Louisiana supreme court since at least 1883.⁴⁷ According to this doctrine, a person who has "permitted the use and occupancy of his land and the construction of a quasi-public work thereon without resistance or even complaint . . . cannot afterwards require its demolition, nor prevent its use, nor treat the company erecting it as his tenant."⁴⁸ In *Harrison*, the Louisiana supreme court reversed, and rendered judgment enjoining defendant to remove the poles. In a scholarly opinion, Justice Calogero indicated the basis and socio-economic justification of the *St. Julien* doctrine, but refrained from re-examining its validity. Under the version of the facts that the court considered as established, there was no acquiescence by the plaintiff landowner and *St. Julien* was clearly inapplicable.⁴⁹ Justice Barham filed a powerful concurring opinion pointing out that the Louisiana Civil Code "sets forth the only methods by which predial servitudes may be acquired," and calling for the suppression of the *St. Julien* doctrine which is an "inequitable, unlawful, and unconstitutional method of expropriation of private property."⁵⁰

BUILDING RESTRICTIONS

The nature of building restrictions has been the topic of discussion in Louisiana ever since Justice Provosty's celebrated opinion in *Queensborough Land Co. v. Cazeaux*.⁵¹ Early Louisiana decisions, which have been rightly criticized,⁵² considered building restrictions to be covenants running with the land. In recent years, however, courts have consistently regarded building restrictions as real obligations and as rights likened to predial servitudes.⁵³ Determination of the nature of building restrictions is not merely a matter of academic concern; it does carry significant practical consequences as illustrated in *Fitzwater v. Walker*.⁵⁴ In this case, Judge Miller offered perhaps the most workable formula yet. Referring to the "unique

47. See *St. Julien v. Morgan L. & T.R. Co.*, 35 La. Ann. 924 (1883).

48. *Id.* at 925-26.

49. See also *Koch v. Louisiana Power & Light Co.*, 298 So. 2d 124 (La. App. 1st Cir. 1974) (non-acquiescence).

50. 288 So. 2d at 41 (Barham, J., concurring).

51. 136 La. 724, 67 So. 641 (1915).

52. See Comment, 33 TUL. L. REV. 822, 826 (1959).

53. See Yiannopoulos, *Real Rights: Limits of Contractual and Testamentary Freedom*, 30 LA. L. REV. 44, 61 (1969).

54. 281 So. 2d 790 (La. App. 3d Cir. 1973).

nature" of building restrictions, he declared that these are "sui generis real rights and should be governed by the general rules applicable to predial servitudes subject to exceptions established by special legislation or jurisprudence as to the creation, enforcement or termination of the restrictions."⁵⁵

PERSONAL SERVITUDES: USUFRUCT

Testamentary donations of usufruct that impinge on the legitime of forced heirs are not null on that account but reducible to the disposable portion.⁵⁶ In *Succession of Hyde*,⁵⁷ discussed in a previous issue of this *Review*,⁵⁸ the Louisiana supreme court faced squarely the question of when a bequest of usufruct impinges on the legitime of forced heirs as well as the method of reduction of an excessive donation of usufruct. In this case, testator left the usufruct of his entire property to the surviving spouse of a second marriage. Testator's children, issues of a previous marriage, attacked the disposition on the ground that it impinged on their legitime and demanded reduction of the donation by removing the usufruct from their forced shares, and thereby limiting the bequest of usufruct to the disposable portion.

In a scholarly and well-reasoned opinion, Justice Calogero re-examined the basis of legitime in Louisiana and French law and reached the conclusion that forced heirship "is a right to a fixed portion of the estate in *property*,"⁵⁹ namely in unencumbered ownership. This means that the legitime may not be satisfied by dispositions in usufruct or in naked ownership in favor of the forced shares, no matter how valuable these rights may be. In all cases in which the usufruct in favor of a legatee exceeds the *quantum* of the disposable portion there is an excessive donation of usufruct that may be reduced, even though the value of the usufruct given does not exceed the *value* of the disposable portion. The question of the valuation of the usufruct and of the naked ownership is thus rendered moot in this context.

Turning to the method of reduction, the court correctly determined that an excessive bequest in usufruct in favor of the spouse of

55. *Id.* at 792.

56. For detailed discussion, see A. YIANNPOULOS, PERSONAL SERVITUDES § 16 in 3 LOUISIANA CIVIL LAW TREATISE (1968).

57. 292 So. 2d 693 (La. 1974). For discussion of the lower court decision, see *The Work of the Louisiana Appellate Courts for the 1972-1973 Term — Property*, 34 LA. L. REV. 207, 213 (1973).

58. 35 LA. L. REV. 205 (1974).

59. 292 So. 2d at 696.

a second marriage, as in the case of any stranger, may be reduced at the option of the forced heirs by application of article 1499 of the Civil Code. Literally, forced heirs may exercise this option only in cases in which the value of a bequest in usufruct exceeds the value of the disposable portion; however, the decision of the supreme court in *Hyde* gives the option to the forced heirs in all cases in which a disposition in usufruct in favor of a legatee exceeds the quantum of the disposable portion, that is, even if it does not exceed the value of the disposable portion. Application of article 1499 will in most cases produce results compatible with the intention of a testator who wishes to bequeath to the surviving spouse of his last marriage the maximum that the law allows. The bequest of the usufruct of the entire estate may well be taken to establish that intention.

Technically, the *Hyde* decision deals with the reduction of an excessive donation of usufruct in favor of a spouse of a second marriage, but the same rule will apply to the reduction of a testamentary disposition of usufruct in favor of the surviving spouse in community that impinges on the legitime of issues of the marriage. Of course, there will be no question of reduction in cases in which a testament merely confirms the legal usufruct under article 916 of the Civil Code.

In *Succession of Chauvin*,⁶⁰ which on account of its peculiar procedural posture is confined to its own facts,⁶¹ the Fourth Circuit Court of Appeal declared, in effect, that a testamentary usufruct in favor of the surviving spouse in community impinges on the legitime of an issue of the marriage when it exceeds the quantum of the disposable portion, even if it does not exceed the value of the disposable portion. This accords fully with the conclusion reached by the Louisiana supreme court in *Succession of Hyde*.⁶² The court of appeal, however, went on to reduce the excessive donation by removing the usufruct from the forced share rather than granting to the forced heir the option of article 1499 of the Civil Code. This determination does violence to article 1499 and is clearly in conflict with the *Hyde* decision; therefore, it has no legal significance as a precedent.

REAL ACTIONS

Article 3653(1) of the Code of Civil Procedure declares that the plaintiff in a petitory action must "make out" his title if the court finds that the defendant is in possession of the property. A plaintiff

60. 286 So. 2d 793 (La. App. 4th Cir. 1974). The Louisiana supreme court refused writs, 293 So. 2d 166 (La. 1974), stating: "Under the peculiar procedural posture of this case, the result is correct."

61. See *Succession of Chauvin*, 260 La. 828, 257 So. 2d 422 (1972).

62. See note 57 *supra*.

makes out his title when he proves his ownership either by an unbroken chain of valid transfers from the original owner or by acquisitive prescription of ten or thirty years. In a sense, such a title is good against the world.

While the text of article 3653(1) is clear and unambiguous, comment (a) under this article has given rise to conflicting judicial determinations. The comment states that the words "make out his title" are taken from article 44 of the Code of Practice, and are intended to have the same meaning as given to them under the jurisprudence interpreting the source provision. Cases decided under the Code of Practice consistently held that if the defendant in a petitory action has possession without a title translatif of ownership, the plaintiff is not required to establish title good against the world but he merely needs to establish a better title than that of the defendant.⁶³ Argument might thus be made that the redactors of the Code of Civil Procedure intended to maintain this jurisprudence and to establish an exception to the burden of proof under article 3653(1).

This argument is respectable and has some significant equitable implications. There may be some merit to the idea that a person with a defective title ought to prevail over a possessor who has no title at all. The view has been expressed that if it were otherwise, a trespasser without any semblance of title might be allowed to "take physical possession of another's property, and should his possession endure for more than a year before it is discovered, any break in the owner's chain, however ancient, would defeat a petitory action to recover the property."⁶⁴

However, such a horror is quite unlikely in real life. In the first place, a possessory action may not prescribe in one year from the date the trespasser took possession of the property but one year from the date the owner acquired knowledge of the possession.⁶⁵ Secondly, a break in the owner's chain does not prevent him from asserting ownership by acquisitive prescription of ten or thirty years.⁶⁶ Literal ap-

63. See, e.g., *Booksh v. New Iberia Sugar Co.*, 115 La. 516, 39 So. 545 (1905); *Kernan v. Baham*, 45 La. Ann. 799, 13 So. 155 (1893); *Peters v. Crawford*, 185 So. 716 (La. App. 2d Cir. 1939). In *J. H. Jenkins Contractors, Inc. v. Farriel*, 246 So. 2d 340, 343 (La. App. 1st Cir. 1971), *aff'd on other grounds*, 261 La. 374, 259 So. 2d 882 (1972), the court, following this jurisprudence declared that "a plaintiff who institutes a petitory action against one who claims not by title, but by possession only, need not adduce evidence disclosing a perfect title, but must exhibit some color of title."

64. *Pure Oil Co. v. Skinner*, 284 So. 2d 608, 614 (La. App. 4th Cir. 1973), *rev'd*, 294 So. 2d 797 (La. 1974). See also 294 So. 2d at 799 (Summers, J., dissenting).

65. See *Rathburn v. Barney*, 29 So. 2d 807 (La. App. 2d Cir. 1947); *Ciaccio v. Hartman*, 170 La. 949, 129 So. 540 (1930); *Pittman v. Bourg*, 179 La. 66, 153 So. 22 (1934), cited in *Babington Children Trusts v. Eimer*, 285 So. 2d 792, 794 (La. 1973).

66. *Pure Oil Co. v. Skinner*, 294 So. 2d 797, 799 (La. 1974): "Respondents, there-

plication of article 3653(1) thus excludes recovery from an adverse possessor only in cases in which the plaintiff is not the true owner. As a matter of policy, this is not an objectionable result.

In *Pure Oil Co. v. Skinner*,⁶⁷ a concursus proceeding, the court held that a person out of possession claiming the ownership of immovable property adversely to a person in possession must "make out" his title. The solution is fully supported by the idea that articles 3651-3653 of the Code of Civil Procedure, which contain new rules of law and make important changes in the field of real actions, have overruled all prior cases that contravene the new provisions. In adopting comment (a) under article 3653, the redactors were apparently thinking of the mainstream of jurisprudence attributing meaning to the words "make out his title" rather than of technical exceptions. Besides, the comment is not a part of the text and cannot be taken to establish exceptions when the text establishes none.⁶⁸ If such an exception were allowed to prevail in the light of the text of article 3653(1), which is clear and unambiguous, a chaotic situation might arise. The burden of proof would no longer be allocated in the light of the defendant's possession as article 3653 requires.

In *Montgomery v. Breaux*,⁶⁹ the Louisiana supreme court held that a petitory action may be defeated by a peremptory exception of acquisitive prescription since the word "prescription" in article 927 of the Code of Civil Procedure includes both liberative and acquisitive prescription. Justice Barham, writing for a unanimous court, declared that the effect of a successful plea of acquisitive prescription as a peremptory exception will be the dismissal of the petitory action; the court may not render judgment recognizing defendant's ownership of the immovable property. If the defendant in the petitory action wishes to have a judgment declaring him owner of the immovable property, he must plead acquisitive prescription in a reconventional demand.

This broad interpretation of article 927 of the Code of Civil Procedure has merit, as it tends to speed up proceedings. A particular defendant, if he so desires, may present his claim of acquisitive prescription on an exception rather than at the trial of the petitory action on the merits. In case of a successful plea of acquisitive prescription as a peremptory exception, however, there will be a paradox: the record owner will be forever out of possession, but the possessor will

fore, have not established either valid record title or prescriptive title to the property in dispute."

67. 294 So. 2d 797 (La. 1974).

68. *Desselle v. Bonnette*, 251 So. 2d 68 (La. App. 3d Cir. 1971).

69. 297 So. 2d 185 (La. 1974).

not be owner. If the successful defendant wishes to be declared owner of the property, he should bring an action for declaratory judgment.

In *Ledoux v. Waterbury*,⁷⁰ a boundary action was defended on the ground that the defendant had acquired the ownership of the disputed strip of land by virtue of the ten year acquisitive prescription of articles 3474 and 3478 of the Civil Code. Lower courts had held that these articles were inapplicable to a boundary action. The Louisiana supreme court, relying on article 3693 of the Code of Civil Procedure, declared that "title prescriptions may be pled in boundary actions, and boundary prescriptions in title suits,"⁷¹ and rendered judgment in favor of the defendant. The decision strengthens the institution of acquisitive prescription and does justice to the intent of the redactors of the Code of Civil Procedure by suppressing the old idea that petitory actions and boundary actions involve mutually exclusive procedural forms.

In *Babington Children Trusts v. Eimer*,⁷² the Louisiana supreme court made it clear the injunctive relief under article 3663(2) of the Code of Civil Procedure is granted only to a person who had *possession* for a full year preceding the disturbance. This requirement will, for good reasons, exclude application of article 3663(2) in favor of a predial lessee.⁷³ A predial lessee, however, has an action for injunctive relief under article 3601 of the Code of Civil Procedure.⁷⁴

70. 292 So. 2d 485 (La. 1974).

71. *Id.* at 487.

72. 285 So. 2d 792 (La. 1973).

73. See *The Work of the Louisiana Appellate Courts for the 1972-1973 Term — Property*, 33 LA. L. REV. 172, 197-98 (1973).

74. *Caney Hunting Club, Inc. v. Tolbert*, 294 So. 2d 894 (La. App. 2d Cir. 1974). In contrast with article 3601, injunctive relief under article 3663(2) is not predicated on a showing of irreparable harm or even fear of future disturbance. *Ward v. Standard Materials, Inc.*, 293 So. 2d 885 (La. App. 1st Cir. 1974).